(5)

No. 85-546

In the Supreme Court of the United States

OCTOBER TERM, 1985

UNITED STATES OF AMERICA, PETITIONER

v.

FLORENCE BLACKETTER MOTTAZ, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JOINT APPENDIX

DERCK AMERMAN
LEONARD A. ZOLNA, JR.
2408 Central Avenue, N.E.
Minneapolis, Minnesota 55418
(612) 789-8805
Counsel for Respondents

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217
Counsel for Petitioner

PETITION FOR A WRIT OF CERTIORARI FILED SEPTEMBER 26, 1985
CERTIORARI GRANTED NOVEMBER 18, 1985

51 P

In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-546

UNITED STATES OF AMERICA, PETITIONER

v.

FLORENCE BLACKETTER MOTTAZ, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JOINT APPENDIX

TABLE OF CONTENTS*

* The opinions of the district court and the court of appeals, the judgment of the court of appeals, and the order denying the petition for rehearing are printed in the appendix to the petition for writ of certiorari and have not been reproduced.

Contents—Continued: Page

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA, THIRD DIVISION

81-1098

FLORENCE BLACKETTER MOTTAZ, ON BEHALF OF HERSELF AND ALL OTHERS SIMILARLY SITUATED, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

RELEVANT DOCKET ENTRIES

DATE	NR	PROCEEDINGS
12/30/81	1	COMPLAINT—CLASS ACTION Issued Summons ASSIGNED TO MAGNUSON-J per M. L. 667 Vol. V
1/15/82	2	SUMMONS ret'd served 1/8/82
3/3/82	3	DEFENDANT'S MOTION FOR EXTENSION OF TIME WITHIN WHICH TO FILE ANSWER for 30 days
3/3/82	4	ORDER (Magnuson-J 3/4/82) that deft. is granted an extension of time to and including April 8, 1982 within which to file its Answer.
	5	NOTICE TO COUNSEL
4/8/82	6	ANSWER
5/25/82	7	ENTRY OF APPEARANCE OF Larry Martin Corcoran in place of Arthur E. Gowran
6/16/82	8	MINUTES OF PROCEEDINGS (Boline-Mag;) IN RE *PRETRIAL CONFERENCE*

DATE	NR	PROCEEDINGS
6/18/82	9	ORDER (Boline-Mag: 6/17/82) THAT NON-DISPOSITIVE MOTIONS BE HEARD BEFORE Dec. 31, 1983; that dispositive motions be noticed/served before Feb. 1, 1982; that discovery be complete on/before Jan. 2, 1984 and that case be ready for trial by date set by Court
	10	NOTICE TO COUNSEL
6/19/82	11	PARTIAL DISMISSAL OF PORTION OF COMPLAINT – dismissed without prejudice.
8/11/83	12	DEFTS MOTION FOR SUMMARY JUDGT
	13	NOTICE OF HEARING OF DEFT MOTION FOR SUMMARY JUDGT ret. before Judge Magnuson Sept. 23, 1983 at 2:00 p.m.
	14	DEFTS. EXHIBITS
	15	AFFIDAVIT OF STEVEN D. TIBBETTS (Separate)
9/9/83	16	DEFTS MOTION FOR LEAVE TO FILE REPLY
9/14/83	17	AFFIDAVIT OF HOPE BREWER
9/21/83	18	STIPULATED FACTS
9/23/83	19	MINUTES (Magnuson-J) Deft. mo. for summary judgt-under advisement
10/7/83	20	MEMORANDUM ORDER (Magnuson-J; 10/6/83) Defts. motion for summary judgt. is granted
	21	JUDGMENT
	22	NOTICE TO COUNSEL w/order CLOSED
10/31/83		REPORTER'S NOTES OF 9/23/83 (ANDERSON-R; Box 83-4) RE: Deft's motion for sum. judgt.

DATE	NR	PROCEEDINGS
11/23/83	23	NOTICE OF APPEAL TO THE EIGHTH CIRCUIT COURT OF APPEALS BY PLTFF. FROM JUDGMENT (Magnuson-J; 10/6/83) Copies to counsel.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

83-2582

FLORENCE BLACKETTER MOTTAZ, ON BEHALF OF HERSELF AND ALL OTHERS SIMILARLY SITUATED, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

RELEVANT DOCKET ENTRIES

DATE	NR	PROCEEDINGS
11/30/83	1	Docketed case
11/30/83		Certified copies notice of appeal; docket entries; judgment
11/30/83		TO SETTLEMENT CONFERENCE
11/30/83		BRIEFING SCHEDULE Applnt DR 12/5/83; DR Aplee 12/20/83; Clerks Record 12/30/83; Appdx 1/9/84; TR 12/30/83; Brief Applnt 1/9/84; Brief Appellee 2/8/84
12/9/83	2	APPEARANCE FOR APPELLEE
12/5/83	3	APPEARANCE FOR APPELLANT
1/3/84	4	APPENDIX: w/ser 12/29 4 copies
1/3/84	5	BRIEF APPELLANT: w/ser 12/29 7 copies
1/11/84	6	Consent of U.S. to Clover Potter filing amicus brief
1/11/84	7	Consent of Appellant to Clover Potter filing amicus brief
1/11/84	8	AMICUS BRIEF: (Clover Potter) w/ser 1/9 7 copies

DATE	NR	PROCEEDINGS
1/11/84	9	MOTION amicus requesting time for oral argument
1/11/84	10	MEMORANDUM in support of motion requesting time for oral argument
1/11/84	11	ORDER: ruling on motion of amicus to participate in oral arguments is deferred. Motion will be presented to panel assigned for hearing and disposition
2/6/84	12	MOTION appellee for extension of time to file brief GRANTED IN PART to February 22, 1984 on 2/6/84
2/22/84	13	MOTION appellee for extension of time to file brief—GRANTED to March 2, 1984 on 2/23/84
3/5/84	14	MOTION appellee for extension of time to file brief—GRANTED to March 7, 1984 on 3/5/84
3/8/84	15	BRIEF APPELLEE: w/ser 3/7 7 copies
3/13/84		To Screening 15 min.
5/24/84		Transferred to June session.
6/7/84	16	ORDER: Motion by the Native American Rights Fund in behalf of amicus Clover Potter for leave to participate in oral argument is granted. Amicus shall be granted five minutes argument, without rebuttal.
6/11/84		ARGUED AND SUBMITTED BEFORE JUDGES HEANEY, JOHN GIBSON AND FAGG IN ST. PAUL. Derck Amerman for aplnt. Kim Jerome Gottschalk (Amicus) J. Carol Williams (DOJ) for aple. Rebuttal by Amerman. Recorded
1/18/85	17	OPINION BY HEANEY PUBLISHED 753 F.2d 71 85

DATE	NR	PROCEEDINGS
1/18/85	18	Judgment of Dist. Ct. reversed and cause remanded for further proceedings in accordance with opinion.
1/25/85	19	MOTION APPELLEE EXTENSION OF TIME TO FILE PETITION FOR REHEARING. w/service.
1/30/85	20	APPELLANTS' BILL OF COSTS w/service.
2/12/85	21	ORDER: Motion of the appellee for an extension of time to and including February 22, 1985 to file petition for rehearing is granted.
2/22/85	22	PETITION APPELLEE FOR REHEARING WITH SUGGESTION OF REHEARING EN BANC CONSIDERATION. w. service.
3/18/85		Received copy of additional citations from counsel for appellee. (O.K. per L.P.)—TO COURT.
4/3/85	23	Appellants' response to appellee's petition for rehearing en banc. w/service.
4/4/85	24	MEMORANDUM OF Clover Potter in support of opposition to petition for rehearing w/service.
4/29/85	25	ORDER: Appellee's petition for rehearing en banc has been considered by the Court and is denied. Petition for rehearing by the panel is also denied.
5/21/85		MANDATE ISSUED.
5/28/85	26	RECEIPT FOR MANDATE.
7/26/85		Received notification that extension of time was granted in which to file petition for writ of certiorari until 9/26/85.
10/14/85	27	NOTICE OF FILING of petition for writ of certiorari to Supreme Court as Case No. 85-546, dated September 26, 1985.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FIFTH DIVISION

3-81-1098

FLORENCE BLACKETTER MOTTAZ, ON BEHALF OF HERSELF AND ALL OTHERS SIMILARLY SITUATED, PLAINTIFFS,

v.

UNITED STATES OF AMERICA, DEFENDANT.

COMPLA'NT—CLASS ACTION

Plaintiff Florence Blacketter Mottaz, an American Indian presently residing in the County of Anoka, State of Minnesota, on behalf of herself and all other American Indians, their heirs or assigns similarly situated, states and alleges:

I.

That the above Court has jurisdiction and this action is brought pursuant to 28 U.S.C. § 2415, § 1353, § 1331, § 1346 and 25 U.S.C. § 345 and the Fifth Amendment to the Constitution of the United States.

II.

That plaintiff Florence Blacketter Mottaz is a descendant and heir of the following original allottees who were granted the land described by the United States of America and which land was held in trust for the original allottees, their descendants, heirs and assigns:

Mary Knickerbocker, LL855 (Leech Lake)
N1/2NE1/4, Section 21, Township 145, Range 29,
County of Cass, State of Minnesota

David Knickerbocker, LL856 (Leech Lake)
NE1/4NW1/4, NW1/4SW1/4, Section 21, Township 145, Range 29, County of Cass, State of Minnesota

Esther Taylor, LL857 (Leech Lake)
SE1/4NW1/4, SW1/4NE1/4, Section 15, Township 141, Range 30, County of Cass, State of Minnesota

III.

That the above three parcels of land were sold or transferred by the defendant in 1954 as more particularly itemized in Exhibit A attached hereto and incorporated herein.

IV.

That said sales were made without the consent or permission of plaintiff Florence Blacketter Mottaz and were, therefore, illegal sales and transfers and are void.

V.

That Exhibit A attached hereto and incorporated herein outlines numerous other illegal and void sales and transfers of land made by the defendant of the land belonging to descendants, heirs and assigns of other original allottees in what is commonly described as the Leech Lake area located in the County of Cass, State of Minnesota and that this action is brought in behalf of those descendants, heirs and assigns of the original allottees as designated in said Exhibit and any other descendants, heirs and assigns not specifically referred to in Exhibit A located in the Leech Lake area.

VI.

This action is also brought in behalf of all the American Indian allottees, their descendants, heirs and assigns which were the victims of illegal and void sales and transfers made without their consent of land located in the state of Minnesota.

VII.

This action is also brought in behalf of all the American Indian allottees, their descendants, heirs and assigns which were the victims of illegal and void sales and transfers made without their consent of land located in the United States of America.

VIII.

Plaintiff Florence Blacketter Mottaz brings this action on her own behalf and as representative of a class as defined in Rule 23, Federal Rules of Civil Procedure. The class consists of all American Indians, their descendants, heirs or assigns from the original allottees of land granted to said allottees and held in trust for them by the United States of America located in County of Cass, State of Minnesota, the State of Minnesota and the United States of America, which land was transferred by defendant without their consent. That the class is so numerous that joinder of all members is impracticable. That there are questions of law or fact common to the class. That the claims of the representative parties are typical of the claims of the class and that the representative parties will fairly and adequately protect the interests of the class.

A. The prosecution of separate actions by individual members of the class would create a risk of:

1) Inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class;
2) Adjudications with respect to individual members of the class would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests;
3) The party opposing the class has acted or refused to act on grounds generally applicable to the class,

thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole;

4) The questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

IX.

That defendant, its agents and employees breached their fiduciary duties and obligations when they transferred the land held in trust for the individual allottees, their descendants, heirs and assigns without obtaining the consent of said parties to said sales or transfers.

X.

Allege in the alternative that defendant, its agents and employees were negligent in the transfer or sale of said lands without obtaining the consent of the descendants, heirs or assigns of the original allottees herein.

XI.

Further allege that plaintiffs were deprived of property without due process of law and that their property was taken for public use without just compensation in violation of the Fifth Amendment to the Constitution of the United States.

WHEREFORE, plaintiffs pray judgment against defendant for the following:

1. Damages in a monetary sum equal to the current fair market value of each parcel illegally transferred or in the alternative for rescission of the illegal sale or transfer and the vesting of title of each individual parcel in the names of the appropriate descendants, heirs and assigns.

2. Reasonable attorney fees and costs incurred herein.

3. Interest and costs and disbursements incurred herein.

/s/ DERCK AMERMAN

Derck Amerman
Attorney for Plaintiffs
2408 Central Avenue N.E.
Minneapolis, MN 55418
789-8805

DATED: DECEMBER 30, 1981.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

3-81-1098

FLORENCE BLACKETTER MOTTAZ, ON BEHALF OF HERSELF AND ALL OTHERS SIMILARLY SITUATED, PLAINTIFFS,

v.

UNITED STATES OF AMERICA, DEFENDANT.

PARTIAL DISMISSAL

That portion of the ad damnum clause of plaintiff's Complaint requesting rescission of the illegal sales or transfers and the vesting of title of each individual parcel in the names of the appropriate descendants, heirs and assigns, is hereby dismissed without prejudice.

/s/ DERCK AMERMAN

Derck Amerman
Attorney for Plaintiffs
2408 Central Avenue N.E.
Minneapolis, MN 55418
789-8805

DATED: JUNE 16, 1982.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Civil File No. 3-81-1098

FLORENCE BLACKETTER MOTTAZ, ON BEHALF OF HERSELF AND ALL OTHERS SIMILARLY SITUATED, PLAINTIFFS,

v.

UNITED STATES OF AMERICA, DEFENDANT.

STIPULATED FACTS

On December 5, 1905, three Chippewa Indian ancestors of Florence Blacketter Mottaz received land allotments on the Leech Lake Reservation in Cass County, Minnesota pursuant to the General Allotment Act of February 8, 1887, 24 Stat. 388, 28 U.S.C., §§ 331 *et seq.*, and the Nelson Act of January 14, 1889, 25 Stat. 642. Those ancestors were Florence Blacketter Mottaz's mother, Esther Taylor, aka Esther Grasshopper, Florence Blacketter Mottaz's maternal aunt, Mary Knickerbocker, and the latter's son, David Knickerbocker. Their Leech Lake allotment numbers were 857, 855 and 856, respectively. The size of the three allotments was 80 acres each. Title to their allotments was held in trust by the United States for periods which were eventually extended indefinitely. Each lot was sold in 1954 to the United States Forest Service and is now included in that area known as the Chippewa National Forest. Each lot was sold with the express consent of some but not all of the heirs.

Respectfully submitted,

JAMES M. ROSENBAUM
United States Attorney

FRANCIS X. HERMANN
Assistant United States Attorney
596 U.S. Courthouse
110 South Fourth Street
Minneapolis, Minnesota
55401
(612) 332-8961

LARRY MARTIN CORCORAN
Attorney, Department of Justice
Land and Natural Resources Division
Benjamin Franklin Station
P.O. Box 7415
Washington, D.C.
20044-7415
(202) 633-2305

Attorneys for Defendant

OF COUNSEL:

MARIANA R. SHULSTAD
Department of the Interior
Office of the Field Solicitor
Twin Cities, Minnesota
55111

DERCK AMERMAN
LEONARD A. ZOLNA, JR.
2408 Central Avenue N.E.
Minneapolis, Minnesota
55418
(612) 789-8805

Attorneys for Plaintiffs

DATED: SEPTEMBER [*], 1983

[FILED: SEPTEMBER 21, 1983]

---

* illegible

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF INDIAN AFFAIRS
Consolidated Chippewa Agency
Cass Lake, Minnesota

April 30, 1953

Florence Blackketter Mattoz [*sic*]
1425 Ruth
St. Paul, Minnesota

Re: Allotment No. LL-855, Mary Knickerbocker
LL-856, David Knickerbocker

Dear Madam:

We are enclosing a corrected form, "Consent to Sale of Inherited Lands" covering lands in the above allotment, to replace the one sent to you recently.

As stated before, some of the owners have requested the sale of this land. Both land and timber, if any, have been appraised; and as soon as we get the consent to sell, an effort will be made to obtain a buyer by advertising for sale bids. This land will not be sold unless the high bid is equal to, or more than, the appraised value. If no reply is received from you within ten (10) days, it will be assumed that you have no objection to the sale.

Regulations now permit the sale of Indian land, and we believe it is an opportune time to sell due to economic conditions and before heirships become further complicated. If you know of anyone who might be interested in purchasing this land, we would appreciate your giving us the names and addresses of such persons.

If you are in favor of selling, be sure to sign each copy of the enclosed Consent in ink on the line immediately above your typed name. If thumb print is used, this should be done in the presence of two witnesses who will sign their names on the lines at the left-hand side of the page. Return

EXHIBIT 1

all copies to this office in the enclosed self-addressed envelope which requires no postage.

Sincerely,

/s/ J. W. KAUFFMAN
J. W. Kauffman
Superintendent

May 17, 1967

Mrs. Florence B. Mottaz
215½ Third Street
Bemidji, Minnesota 56601

Dear Mrs. Mottaz:

Reference is made to your visit to this office on May 12 regarding your desire to sell all of your inherited land interests, including Wisconsin, to the Tribe, except for FDL 140 which you state the heirs wish to retain.

According to our records you hold an undivided 1/15 interest each in FDL 139 and NL 48 (Minnesota) and an undivided 1/10 interest in BR 21 (Wisconsin).

We are enclosing applications for negotiated sale to the Minnesota Chippewa Tribe of your undivided interests in FDL 139 and NL 48. Please complete the applications in detail, sign where indicated, and return them to this office. We will then take the matter up with the Tribal Executive Committee at their next regular meeting in June, and will advise you as to what action they take.

As to BR 21 (Wisconsin), we are enclosing an application for negotiated sale of your undivided 1/10 interest. Please complete the application in detail, sign where indicated, and forward same to the Great Lakes Agency, Ashland, Wisconsin, which is the agency that has jurisdiction over this land.

We trust this is satisfactory.

Sincerely yours,
/s/ F. W. LEAF
Realty Officer

Enclosures 3
cc: Great Lakes Agency (Realty)
Realty: HJSchei 5-17-67

DEFENSE EXHIBIT "A.8"

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 20240

MAY 31, 1979

Memorandum

To: Solicitor
Assistant Secretary—Indian Affairs
From: Associate Solicitor, Indian Affairs
Subject: Numerous allotment transfers void due to administrative error

The Twin Cities Field Solicitor has called our attention to a serious problem involving conveyances of inherited allotments pursuant to the Act of May 14, 1948 (25 U.S.C. § 483) [hereinafter referred to as the 1948 Act]. The problem is potentially as troublesome as some of the eastern Indian land claims, as it involves over 500 conveyances in the Minnesota Agency alone and perhaps hundreds more elsewhere.

In short, the 1948 Act authorized the Secretary to approve real estate conveyances "upon application of the Indian owners" with respect to interests in land held by individual Indians on reservations of tribes organized under the Indian Reorganization Act of 1934. The problem is that between 1948 and 1958 BIA officials approved numerous conveyances of inherited allotments without the requisite consents of all the Indian land owners. This was done notwithstanding a June 24, 1955, Memorandum from the Associate Solicitor for Indian Affairs to the Commissioner of Indian Affairs advising that the interests of a non-consenting owner may not be sold by the Secretary. As a result, it appears that numerous transactions were entered into without the requisite authority and are

EXHIBIT 1

therefore void. See *Ewert* v. *Bluejacket,* 259 U.S. 159 (1922). Current holders of those 160-acre allotments include non-Indians, municipalities, Indian tribes, and federal agencies such as the U.S. Forest Service. Their titles now suffer from a severe cloud which is a direct result of unauthorized administrative action.

A further complication is that many of the heirs whose interests were transferred without their consent often did not receive much if any of the consideration paid for their interests because that money was used to pay off the debts of the deceased allottee, including state old age assistance claims contrary to the ruling in *Running Horse* v. *Udall,* 211 F.Supp. 586 (D.D.C. 1962). It should be noted, however, that this practice was endorsed by the Solicitor's Office on a number of occasions.

Evidently the BIA officials responsible for the conveyance approvals during this period were of the view that the 1948 Act merely reinstated a provision in section 1 of the Act of June 25, 1910, to the effect that if the Secretary decides that one or more of the heirs to an allotment is incompetent, "he may, in his discretion, cause such lands to be sold." 25 U.S.C. § 372. The Secretary's authority under that provision was nullified with respect to allotments on IRA reservations by section 4 of the IRA (25 U.S.C. § 464), which prohibits that approval of any conveyance or transfer of restricted Indian lands. The 1948 Act was intended to overcome that prohibition, but it did not merely reinstate the 1910 Act. Rather, it provided a new standard for the conveyances of allotments, namely that such conveyances be made only "upon the application of the Indian owner." A detailed discussion of the legal issues may be found in a March 7, 1978, Memorandum from the Twin Cities Field Solicitor (attached).

OPTIONS

The first, and perhaps most obvious alternative, is to recommend to the Justice Department that suits in ejectment or to quiet title be filed on behalf of the beneficial owners of the allotments unlawfully conveyed. Such suits, insofar as they seek damages for unauthorized possession of the land prior to 1966, would be subject to the statute of limitations due to run on April 1, 1980. Unfortunately, this action would appear to put us in the position of suing innocent purchasers of Indian lands and their grantees as a direct result of BIA misfeassance. Furthermore, the beneficiaries of such lawsuits may be difficult to identify since the BIA may no longer have adequate records of the heirs to former allotments. And even if they can be identified, in cases where heirship is quite fractionated (a reason, we presume, for not obtaining consents to the conveyance in the first place) the benefit to the heirs from such a suit may be minimal. Where Indian tribes now possess the land, we are in a flat conflict of interest as trustee, and where some federal agency claims title to the land, no lawsuit can be filed at all.

Another alternative is for the BIA to take administrative action to cancel the patents unlawfully issued. Any persons adversely affected by this action could then seek APA review. This is the tentative recommendation of the Field Solicitor, and it certainly would be a more efficient procedure than filing quiet title suits.

The disadvantage to this option is that it provides no means of seeking trespass damages for pre-1966 unlawful possession. Hence, this option is available both before and after April 1, 1980.

A third option is to seek legislation which would resolve this very sticky problem. Of course, to so state begs the question of what the legislation might provide for. One solution—and there may be many—would be to ratify all transfers of allotments which resulted from such BIA

error, and then to provide for an administrative claims procedure under which the former beneficial owners of the allotments could seek remuneration from the United States for the fair market value of their interest in the property at the time of the transaction, plus 6% simple interest since the date of the transaction, minus any consideration which the Indian owner may have actually received at the time of the transaction. Perhaps we could limit such claims to persons who *did not* consent to the transactions as required by the 1948 Act. Indeed, the transfer of the undivided interests of consenting owners may have been entirely valid, notwithstanding the fact that other owners of the same allotment may not have consented. Such legislation might also provide that the BIA has an affirmative duty to seek out all such beneficial owners and provide them with notice of such a claims procedure.

An obvious disadvantage to this solution is that it will cost the United States Government some fair amount of money. The actual amount for which the U.S. might be liable cannot yet be determined because we do not know how extensive this unauthorized administrative practice was outside of the Minneapolis Area. We are trying to get that information at this time. See attached memorandum of February 16, 1979.

We may also be criticized for proposing such a solution because we are seeking only money rather than land for the beneficial Indian owners, and this is contrary to our general policy of trying to provide some more permanent benefits to our Indian wards. The question might also be raised why we have not endorsed such a ratification procedure in the case of the eastern Indian land claims. The difference between the eastern claims and this problem is a significant one, however. In the case of the eastern claims there was no actual misfeasance or fault on the part of the United States except that Congress and the executive

branch as a whole appeared to have disregarded Indian land transactions on the east coast. In contrast, this problem involves affirmative administrative action taken without sufficient statutory authority therefor.

Also, in many of these cases the Indian people have not been asserting these claims on their own. Rather, we have discovered the clouds on the titles to these lands as a result of our search of BIA files as part of our general statute of limitations effort. Perhaps most of the beneficial owners of these allotments would be satisfied with cash remuneration since they are not now seeking a return on those lands or the lands of their ancestors. On the other hand, in some areas Indian claimants appear to be organizing to assert claims to the land itself. At any rate, any legislative solution will undoubtedly be both expensive and controversial.

We look forward to your guidance on this most difficult problem.

THOMAS W. FREDERICKS

Attachment

MARCH 15, 1978

Real Prop. Mgmt.

Memorandum

To: Assistant Secretary of the Interior
Attention: Office of Trust Responsibilities

From: Office of the Area Director

Subject: Sale of Indian Allotments without Consent

The attached memorandum dated March 7, 1978, to the Associate Solicitor from the Field Solicitor raises a number of questions concerning the sale or transfer of property in the Minneapolis Area during the 1950's. We have additional questions concerning the history of the practice of using the Secretarial Order Transferring Inherited Interests procedure and the substantiation used in approval of the earliest cases we have been able to locate in our records.

Some research at this office has disclosed that the procedure was used as early as April 8, 1948, when a 1/3 undivided interest was conveyed by heirs in Leech Lake Reservation Allotment No. 1422 and approved by the Assistant Commissioner of Indian Affairs. The conveyance was made to trust status for the Minnesota Chippewa Tribe as were eight other tracts conveyed to trust status during 1948. In 1950 and early 1951, several conveyances were similarly made but to trust for individuals on the Oneida Reservation, Leech Lake and one at Fond du Lac. From October 1951 through March of 1954, sixty-seven conveyances were made by Order Transferring Inherited Interests on Mille Lacs Reservation tracts to trust for the Minnesota Chippewa Tribe and several more similarly on Nett Lake allotments. In July 1954 the Orders Transferring Inherited Interests were utilized to convey Leech Lake allotments to the United States of America as a common procedure as

EXHIBIT 2

shown on pages 4 and 5 of the attached list. (Three allotments were conveyed in July 1953). We note in the 1948–1950 period the conveyances were surnamed by Rex Barnes and B. O. Angel who at that time was the Hearings Examiner and Field Solicitor.

More research will be necessary to list all the tracts conveyed by Orders Transferring Inherited Interests as recorded in our Deed Volumes. Those conveyed by issuance of fee patent are also of concern and will be more difficult to list completely since they will have to be segregated by those having full consents etc.

The Field Solicitor memorandum states that the figure of 2000 tracts is even greater on the reservation in Wisconsin and Michigan. This is extremely doubtful since the Chippewa Reservations were all allotted by restricted fee patent and all sales were made by deed. Where trust patents were issued on Public Domain and Homestead Allotments fee patents were issued in cases without full consent of owners but Section 8 of the Act of June 18, 1934 excludes those from the provisions of the Indian Reorganization Act.

Your assistance in determining the extent of the entire problem and appropriate resolution of it are vitally needed. The issue will undoubtedly raise a vast number of clouded title cases of a complex nature.

As we prepare additional lists of tracts involved in questionable conveyances copies will be furnished.

Acting Area Director

Attachments

EXHIBIT 3

March 7, 1978

Memorandum

To: Solicitor, Washington, D.C.
Attention Associate Solicitor, Indian Affairs

From: Field Solicitor, Twin Cities, MN

Subject: Sale of Indian Allotments without Consent

In reviewing many of the allotment files at the Minnesota Agency, Bemidji, it recently became apparent that great numbers of allotments were sold during the 1950's. In checking further on some of these sales, it seems that many were made with only partial consent of the heirs of the original allottees, and some were made with no consent whatsoever. The documents from three representative sales are enclosed for your information, and the Agency Realty Officer has begun a systematic review of the files. He estimates, from his initial stages of review, that upwards of 2,000 parcels of land were sold during that period with less than full consent of the beneficiaries and in questionable circumstances. If there were 2,000 of such sales on the six Minnesota Chippewa Tribe reservations alone, it is likely that the figure is even greater on the reservations under the jurisdiction of the Great Lakes Agency and the Michigan Agency.

With regard to the sales of Minnesota Chippewa Allotments, the allotments in question were trust allotments and were made pursuant to the General Allotment Act of February 8, 1887, 24 Stat. 338, and the Nelson Act of January 14, 1889, 25 Stat. 642, though some few allotments on the Fond du Lac and Grand Portage Reservations were made previously under the Treaty of September 30, 1854, and were in restricted status. The allotments were either not made until after 1909 or were extended at

some point by Executive Order, and were then extended indefinitely when all six reservations voted to accept the provisions of the Indian Reorganization Act of June 18, 1934, 43 Stat. 985, Section 4, 25 U.S.C. § 464, provides:

> Except as provided in sections 461, 462, 463, 464, 465, 466, 470, 471, 473, 474, 475, 476, 478, and 479 of this title, no sale, . . . or other transfer of restricted Indian lands . . . shall be made or approved *Provided, however,* That such lands or interests may, with the approval of the Secretary of the Interior, be sold, devised, or otherwise transferred to the Indian tribe in which the lands or shares are located. . . .

The extent to which the above section is applicable to trust alloted lands on reservations where the Indian Reorganization Act was adopted does not appear to have been judicially determined, though the Solicitor spoke to the question in *Scope of the Secretary's Authority Under the Act of May 14, 1948,* M-36003, June 7, 1950, as follows:

> This prohibition applies to all "restricted Indian lands," including trust lands, [See Estate of Ke to sah Jefferson, IA 19, May 4, 1950,] held by individual Indians who are members of tribes that brought themselves within the compass of the 1934 act. [See Solicitor's memorandum of November 20, 1934, to Commissioner of Indian Affairs.] Thus, all such lands are "held under," or subject to, the provisions of the 1934 act.

The above interpretation seems consistent with the interpretation placed on Section 4 of the I.R.A. by the Bureau of Indian Affairs during the balance of the 1930's and the 1940's, since no allotted lands appear to have been sold on I.R.A. reservations during that period except in accordance with that section. However, with the passage of the Act of May 14, 1948, 62 Stat. 236, 25 U.S.C. § 483, the interpretation appears to be, at least with respect to sales of

alloted lands, that the provisions of Section 4 of the I.R.A. were repealed. The 1948 act provides:

> The Secretary of the Interior, or his duly authorized representative, is authorized in his discretion, and upon application of the Indian owners, to issue patents in fee, to remove restrictions against alienation, and to approve conveyances.

The only reported decision on this question, though only a brief Per Curiam opinion on unstated facts, seems to support this interpretation. *Lac du Flambeau Band of Lake Superior Chippewa Indians* v. *McKay,* 221 F.2d 336 (D.C. Cir. 1955), states cryptically,

> We agree with the District Court that the Act of May 14, 1948, 62 Stat. 236, 25 U.S.C.A. § 483, released certain Indian lands in Wisconsin, including those here involved, from prohibitions against sale or transfer imposed by the Act of June 13, 1934, 48 Stat. 935, § 4, 25 U.S.C.A. § 464.

Apart from the plain language of the 1948 act, if it were true that it simply repealed restrictions on sale or transfer of allotted lands imposed by Section 4 of the I.R.A., it would also, in turn, reinstate the act of June 25, 1910, 48 Stat. 647, 25 U.S.C. § 372, which provided in part,

> If the Secretary of the Interior decides the heir or heirs of such decedent competent to manage their own affairs, he shall issue to such heir or heirs a patent in fee for the allotment of such decedent, if he shall decide one or more of the heirs to be incompetent, he may, in his discretion, cause such lands to be sold: . . . *Provided,* That the proceeds of the sale of inherited lands shall be paid to such heir or heirs as may be competent and held in trust subject to use and expenditure during the trust period for such heir or heirs as may be incompetent as their respective interests may appear. . . .

The statute specifically requires a finding, prior to effectuation of the sale of allotted lands, that one or more of the heirs are incompetent. It does not, however, speak to the question of whether or not all heirs must consent to the sale. As recently as June 15, 1971, a fairly comprehensive legal memorandum was prepared by your office in connection with an appeal of Mrs. Cynthia Midthun for sale of Fort Peck Allotment No. 1279, a copy of which is attached for your ready reference. It initially correctly points out that one or more of the heirs must be found incompetent before the Secretary has authority to sell the land, and then proceeds to discuss the various Solicitor's Opinions which hold that sales may be made with less than full consent, being a memorandum of August 14, 1937, an opinion entitled *Authority of Commissioner of the General Land Office to Issue Patents in Fee Covering Indian Allotments with Reservations of the Minerals Underlying the Allotments in Favor of Indian Owners,* M-33967, 59 I.D. 109 (August 29, 1945); a footnote in an opinion on another subject, entitled *Patents in Fee,* M-36134, 61 I.D. 398 (February 15, 1954), and a questionable reference in an opinion entitled *Consent of Indians for Sale of Allotted Timber,* M-36477, 65 I.D. 101 (March 5, 1958). The 1971 opinion concludes,

> I have found no case law dealing with the specific question of whether sales by the Secretary under 25 U.S.C. § 372 require consent of all the owners. However, the statute on its face does not require such consent and the legislative history is at best, inconclusive. Bureau policy has authorized such sales for many years and we have previous Solicitor's opinions which support the concept that consent is not required. An argument could be made that the Bureau's policy under 54 IAM 2.2.3A(1) suffers from ambiguity and thus increases the possibility of nonuniform application of the policy to individual cases, which may cause a court to strike down this administrative practice. 2 Am. Jur. 2d *Administrative Law* §§ 240 250 (1962). However, there seems to be sufficient authority to sustain the Bureau's present policy of allowing sale of inherited lands without the consent of some of the owners as long as the conditions mentioned in 54 IAM 2.2.3A(1) are present.

The opinion does, however, recognize, on page 3, that the question is being answered only with reference to reservations not under the Indian Reorganization Act.

Again assuming that the 1948 act reinstated full application of the 1910 act, and assuming that the various Solicitor's Office opinions are correct in that consents from all heirs are not necessary prior to sale, many of the sales which took place on the reservations of the Minnesota Chippewa Tribe did not even meet the minimal requirements of the 1910 act. Of the three examples enclosed, the only mention made of incompetency is contained in the letter from the Superintendent to the Area Director recommending approval of the sale, and that is contained only in the files on Fond du Lac #14B and Fond du Lac #1d. No mention whatsoever of incompetency is made in the file on Leech Lake #15. In the letter relating to Fond du Lac #14B, the Superintendent states that, of the 46 heirs, 17 consented, 15 failed to reply to his inquiry, addresses were unknown for 10 of the heirs, 3 were deceased, and 1 was insane. No supporting documentation whatsoever is provided concerning the insanity. In the letter on Fond du Lac #1d, the Superintendent states that, of the 41 heirs, 31 consented, 4 were deceased and 6 failed to reply, though the letter goes on to state that 2 of the 6 who did not reply objected to the proposed sale in writing. He then goes on to note that a number were incompetent, naming 2 and stating that 5 others were minors, though presumably these 7 were among those who consented, and again, there is no supporting documentation. Of the 5 heirs to Leech

Lake #15, none consented and one of these voiced oral objections to the sale. Here there was no statement that any of the 5 was incompetent.

It does not, however, appear to be a reasonable interpretation of the 1948 act to hold that it merely repealed Section 4 of the Indian Reorganization Act, reinstating the authority of the Secretary under the 1910 act. The language of the 1948 act specifically states that the Secretary is authorized to issue patents and approve conveyances "upon application of the Indian owners." This imposes an additional condition upon the existence of Secretarial authority to sell, issue patents or approve conveyances, which condition was not specifically contained in the 1910 act. The fact that application or consent of the Indian owners is required for sale of an allotment subject to the provisions of the I.R.A. and the 1948 act would seem to parallel the requirement of participation by heirs to sell timber, under the provisions of the act of June 25, 1910, 36 Stat. 857, 25 U.S.C. § 406. While the precise language of the statute is a bit different, it likewise does not specifically say that *all* heirs or trust beneficiaries must consent prior to a sale of timber from the allotment, but, nevertheless, the Solicitor, in *Consent of Indians for Sale of Allotted Timber, supra,* held,

> There are numerous acts of Congress delegating broad powers of discretion to the Secretary with respect to selling, leasing, or granting easements or other interests in Indian lands or disposing of the products thereof, or approving such actions by Indian restricted owners, but unless the statute specifically empowers the Secretary to act without the consent or approval, express or implied, of all co-owners, as in the partition statutes to which you refer (acts of June 25, 1910 (36 Stat. 855), and May 18, 1916 (39 Stat. 127), as amended, 25 U.S.C. secs. 372 and 378), he has been reluctant to face possible litigation from a

> hostile minority ownership, even if the transaction appears in the best interests of all co-owners.
>
> In conclusion, in view of the provisions of the 1910 act, supra, [25 U.S.C. § 406] the Secretary should approve no sale of timber on allotted Indian lands without the consent, express or implied, *of all owners thereof,* . . . (Emphasis added)

An even stronger analogy exists to the interpretations placed on Section 6 of the General Allotment Act of February 8, 1887, 24 Stat. 390, 25 U.S.C. § 349, as amended by Act of May 8, 1906, 34 Stat. 182, which provides,

> [T]he Secretary of the Interior may, in his discretion, and he is authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs at any time to cause to be issued to such allottee a patent in fee simple, and thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed and said land shall not be liable to the satisfaction of any debt contracted prior to the issuing of such patent; . . .

Though there is a complete absence in the above language of any provision requiring application or consent by the allottee, it has been consistently held, not only by the Solicitor but also by judicial and Congressional interpretation, that application and consent is a vital prerequisite to issuance of a fee patent to the allottee.

During the period from approximately 1915 to 1921 or 1922, thousands of fee patents were issued to allottees around the country, all without application on the part of the allottee. Many were issued to heirs of a deceased allottee again without application. The Acts of February 26, 1927, 44 Stat. 1247, 25 U.S.C. § 352a, and February 21, 1931, 46 Stat. 1205, 25 U.S.C. § 352b, were passed specifically to alleviate the situation and authorized cancellation of fee patents issued without application or consent of the patentee. They were described thus, in

Authority to Cancel Patent of Indian Allottee After Land is Incumbered by Lien—Acts of February 26, 1927, and February 21, 1931, 54 I.D. 160, February 18, 1933;

> The object of both statutes, of course, was to correct or remedy the administrative error of casting the fee title upon the Indian without his application or consent, by authorizing the Secretary to cancel the patent so issued.

The language which the courts have applied in striking down patents issued to allottees and then heirs without application or consent is even more compelling when applied to sales without application or consent of heirs, particularly in light of the application requirement contained in the 1948 act, which does not appear in the General Allotment Act. Even so, the court in *United States* v. *Nez Perce County,* 16 F.Supp. 267 (D. Ida. 1936), *reversed on other grounds,* 95 F.2d 232 (9th Cir. 1938), held that "[t]he statute is clear that the consent and application must precede actual issuance of patent, and such consent must be positive and certain. See also, *United States* v. *Lewis County,* Idaho, 95 F.2d 236 (9th Cir. 1938); *Glacier County* v. *Frisbee,* 117 Mont. 578, 164 P.2d 171 (1945), *Iyall* v. *Yakima County,* 130 Wash. 537, 228 P. 513 (1924) *Bacher* v. *Patencio,* 232 F.Supp. 939 (D. Cal. 1964), *aff'd* 368 F.2d 1910 (9th Cir. __); and *United States* v. *Ferry County,* 24 F.Supp. 399 (D. Wash. 1938), which held,

> The Indians' vested right in this private property can only be divested by due process of law, it may not be impaired by legislative act, even when the Indian is a subject of guardianship, *Jones* v. *Meehan,* 175 U.S. 1, 20 S.Ct. 1, 44 L.Ed. 49 *Choate* v. *Trapp,* 224 U.S. 665, at page 677, 32 S.Ct. 565, 56 L.Ed. 941, supra. The Congress may remove restrictions to alienation with or without the consent of the allottees, *Williams* v. *Johnson,* 239 U.S. 414, 36 S.Ct. 150, 60 L.Ed. 358,

> but such is a clear distinction from depriving the allottees, without their consent, of the vested right to hold land free from taxation for 25 years, *U.S.* v. *Benewah County,* Idaho, 9 Cir., 290 F. 628, supra; *Choate* v. *Trapp,* . . . "it is noteworthy that, in other contemporaneous general provisions for granting Indian allottees patents in fee simple, it is expressly provided that such action might be had 'upon application' of the Indians."

The above quotation from *United States* v. *Ferry County, supra,* and *United States* v. *Benewah County, Idaho,* 290 F. 628 (9th Cir. 1928) could be equally applicable to sale of inherited interests without application or consent, for the interest of each heir is a vested right in private property which cannot be divested without due process of law. In fact, it is difficult to find a distinction between issuance of a fee patent to the heir of an allottee without his application and sale of the property of an heir of an allottee without his application. If anything, the latter is a more flagrant violation of due process, particularly in light of the specific requirement of application contained in the 1943 act.

Assuming that you concur in our ultimate conclusion that these sales, absent consent of all heirs, were unauthorized, the question remains as to how to deal with these cases. We would initially recommend that cancellation of the patents issued to purchasers be requested. There is some authority to the effect that notice to the current record title owner must be given of the intent to cancel such a patent. *Bisek* v. *Bellanger,* 5 F.2d 994 (D. Minn. 1925), states, "[t]here could be no cancellation without notice to the person actually interested and opportunity for a hearing in reference to the action proposed." Given such notice and hearing, any subsequent litigation could be in the form of Administrative Procedure Act review of agency action, rather than quiet title action by the United States

on behalf of the heirs of the allottee. This would seem the more logical approach, though could not be followed in all cases. The file on Leech Lake #15, which is enclosed, is representative of a sizeable percentage of less than full consent sales on the Leech Lake Reservation where the purchaser was the United States Forest Service. Administrative negotiation with the Department of Agriculture will be necessary to resolve these cases, and it is likely that similar sales to the Forest Service and other Federal agencies have taken place on other reservations, such as Lac Courte Oreilles and Lac du Flambeau in Wisconsin, where National Forests now include portions of Indian Reservations.

Similar to the situation where the United States Forest Service was purchaser of the allotted lands, there are cases of properties sold with less than full consent during the 1950s which have since been purchased by the United States in trust for the tribe or band. The Realty Officer of the Minnesota Agency has identified one such tract which has been purchased in fee by the Minnesota Chippewa Tribe subject to a substantial purchase money mortgage and on which the Tribe has constructed extensive improvements. Easiest to deal with will be those parcels sold to private parties which have passed to counties or states through tax forfeitures or other methods. The bulk of these cases, however, will undoubtedly consist of sales to private persons who have either retained the properties or sold them to other private interests.

Complicating each of these cases is the question of liability for damages. In each case the appraised value of the property was paid to the Bureau of Indian Affairs by the purchaser to whom the fee patent or deed was issued. One court has held that any refund of the purchase consideration must come from the beneficiaries who received the consideration initially. The court in *Siniscal* v. *United States,* 208 F.2d 406 (9th Cir. 1953), *cert. denied* 348 U.S. 813, 75 S.Ct. 29, 99 L.Ed. 645, stated,

> No portion of the public treasury may be used to refund the purchase price of lands subject to control of the United States where the purchase was set aside as having been made in violation of the applicable laws and regulations.

However, in many of the cases, the heirs of the original allottee received nothing or very little of the actual consideration paid for the lands, the proceeds instead being applied to claims against the estates of the allottee or previous beneficial owners or to state social security or Old Age Assistance claims. The file on the sale of Leech Lake Allotment #15 is an example of a case where the entire proceeds from sale were applied to an Old Age Assistance claim.

A number of Solicitor's Opinions uphold the practice of paying such claims from the proceeds accruing to an estate after the death of an allottee, even where the estate has been settled, and the property distributed to the heirs. *State Social Security Claims Against Restricted Indian Estates,* 61 I.D. 37, June 2, 1952, discusses a number of these and discards many of the arguments against such practice. The Solicitor said,

> The jurisdiction of the Secretary of the Interior over the trust or restricted estates of deceased Indians, including the determination of heirs and the approval of wills, is based upon sections 1 and 2 of the act of June 25, 1910, as amended (25 U.S.C., 1946 ed., accs. 372, 373). . . . the practice of considering and allowing claims against the estates of deceased allottees was almost immediately instituted.[1] [[1]See *Grace Cox et al.*, 42 I.D. 493, 501, 502 (1913), where it was said apropos of claims. "Claims for reasonable expenditures of this nature receive favorable consideration in this Office and are paid out of rentals or other funds remaining to the credit of the estate."]

The property of paying claims against the trust or restricted estates of Indians has been recognized in recent years by two Solicitors of the Department, who expressly stated that such claims might be paid not only from income to the credit of the estate at the time of the decedent's death but also from income accruing to the estate subsequent to the death of the decedent.[2] [[2]See letter dated June 20, 1949, from Solicitor Margold to the Solicitor of the Department of Agriculture, and letter dated September 23, 1944, from Solicitor Harper to Senator Harlan J. Bushfield of South Dakota.]

It is clear that the 1910 statute confers upon the Secretary of the Interior an implied power to allow claims against trust restricted Indian estates . . .

It might be contended that the departmental practice in the matter of allowing claims against trust or restricted Indian estates runs counter to the provision in section 5 of the General Allotment Act of February 3, 1887, (24 Stat. 389), as amended (25 U.S.C., 1946 ed., sec. 348), which states that at the expiration of the trust period of an allotment the United States will convey the same 'free of all charges or incumbrance whatsoever,' and to a related provision in the act of June 21, 1906 (34 Stat. 327, 25 U.S.C., 1946 ed., acc. 354), which states that no allotted land shall become 'liable to the satisfaction of any debt contracted prior to the issuing of the final patent in fee therefor.' Even conceding, for the sake of argument, that these provisions would preclude the allowance of claims against the estates of allotted Indians, it is clear that they have, in effect, been set aside by the later adoption of the act of June 25, 1910, which, properly construed, permits the allowance of such claims.

A directly contrary holding resulted from the appeal from an order of a Departmental Hearing Examiner allowing a

sizeable Old Age Assistance claim and directing payment from future income from the trust property devolving upon the heirs. The Ninth Circuit, in *Mary Hit Him Running Horse* v. *Udall,* 211 F.Supp. 536 (d, D.C. 1962), stated emphatically,

> Neither 25 U.S.C. § 372 nor 25 U.S.C. § 410 authorizes the defendant to direct payment of the debts of a deceased Indian out of the moneys accruing after death from trust lands in the hands of such decedent's Indian heirs.
>
> The action of the Secretary violates the statutory requirement that the trust property "shall not be liable to the satisfaction of any debt" contracted prior to the issuance of a patent in fee.
>
> Insofar as the opinion of defendant's Solicitor reported at 61 I.D. 37 (1952) is inconsistent herewith, that decision is erroneous.

In the only opinion which we have found since 1962 dealing with the subject, the Interior Board of Indian Appeals dismissed the decision *Running Horse* as being simply inapplicable, though the facts in that case, *Estate of Martin Spotted Horse, Sr. (Crow Allottee No. 3536, Deceased),* 2 IBIA 265, 81 I.D. 227, April 25, 1974, were vastly different from those in *Running Horse.*

We thus need three issues determined:

1. Whether or not sales of allotted lands on Indian Reorganization Act Reservations with less than full consent of the beneficial owners violated applicable statutes and regulations, and are void or voidable.

2. If either void or voidable, the proper procedure for recovering the lands or interests in lands. Determination should be made as to whether recovery can or should be made of the entire interest in such lands or only of those fractional shares held by heirs who did not consent to the sale.

3. The appropriate source for and measure of damages. If refund of consideration paid for purchase of the lands is to be derived from the beneficial owners at the time, further review and a definitive position must be taken on the payment of such funds to outside sources in satisfaction of claims against the estates of deceased Indians.

In light of the fact that vast numbers of these cases appear to exist and would require processing prior to the expiration of the statute of limitations at 28 U.S.C. § 2415, we would appreciate your expedited review of these problems. If you require further information, please ask and we will do everything possible to provide.

/s/ ELMER T. NITZSCHKE
Field Solicitor

Enclosures:
cc: Minneapolis Area Office, BIA, Mpls., MN,
Minnesota Agency, Bemidji, MN
Great Lakes Agency, Ashland, WI
Boston, MA

Real Prop. Mgmt. March 20, 1978

Memorandum

To: Assistant Secretary of the Interior
Attention: Office of Trust Responsibilities

From: Office of the Area Director

Subject: Sale of Indian Allotments Without Consent

Reference is made to one memorandum of March 15, 1978, regarding questions on the transfer of allotted interests in the Minneapolis Area by means of Secretarial Order Transferring Inherited Interests. Our deed files have been reviewed from the beginning of recordation in 1948 through 1961 and the attached list of transfers were recorded in that period.

There were 490 sales some representing two tracts of the same allotment. Nearly all were on the Leech Lake and Mille Lacs Reservations and we note that in 22 cases consents from all heirs were obtained. Each of the case files would have to be examined to determine that actual consents signed by heirs at the time.

There were also a fairly large number of cases of sale by issuance of patent in fee in which we also understand that they failed to obtain consents from all heirs. We will try to list these as well to determine the full extent of the conveyance procedures during that period.

/s/ BERNARD GRANUM
Acting Area Director

Attachment

cc: Minnesota Agency w/attachments
Field Solicitors Office w/attachments

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR

To: Solicitor
Assistant Secretary, Indian Affairs

July 18,1979

From: Associate Solicitor, Indian Affairs

Subject: Allotment transfers void due to administrative error

In a May 31, 1979, memorandum I called your attention to a serious problem involving transfers of inherited allotments on IRA reservations without the consents of all the heirs, as is evidently required by 25 U.S.C. § 483. At that time we estimated that hundreds of transactions handled by the BIA between 1948 and 1958 were void, at least in part, because of the failure to obtain the requisite consents. Innocent landowners, including Indian tribes and individual Indians, now hold record title to many of those inherited allotments which suffer from a cloud on title as a result of the past administrative error.

Our worst fears have now been confirmed. The Minnesota Agency of the BIA has reported 619 such transfers. Hundreds more are expected to be reported from the Aberdeen and Billings Areas. Few, if any, such transfers are expected to be identified in the Southwest because of the relatively small-scale allotting there and the fact that most tribes in that area are non-IRA. Oklahoma and Alaska are not subject to the provisions of 25 U.S.C. § 483, and it appears that we do not have a serious problem in the Far West. But the problem in the Northern Great Plains is of significant magnitude.

Since virtually all of the nonconsenting heirs' claims are in part subject to the April 1, 1980, statute of limitations found at 28 U.S.C. § 2415, it is important that we address

this problem as soon as possible. I therefore recommend that we have a meeting at your earliest convenience. The May 31 memorandum should serve as a sufficient option paper for purposes of opening the meeting.

THOMAS W. FREDERICKS

CONSENT TO SALE OF INHERITED LANDS

WHEREAS, the undersigned, is the owner of an undivided 294/8820 interest in those certain lands described as NE¼NW½, NW¼SW¼ Sec. 21, T. 145 N, R. 29 W., 5th P.M., County of Cass, Minnesota which were allotted to David Knickerbocker deceased allottee No. 856 of the Leech Lake Reservation, and

WHEREAS, I have been advised that under authority of the Act of June 25, 1910 (36 Stat. 855) and other applicable provisions of law, the Secretary of the Interior or his duly authorized representative proposes to sell the above described land at the appraised value of $420.50, which is acceptable to me as adequate compensation for said lands;

NOW, THEREFORE, I hereby consent to the sale of said lands and request the Secretary of the Interior or his duly authorized representative to sell and convey all of my right, title and interest therein, subject to payment to me or deposit to my credit at the Consolidated Chippewa Agency, my proportionate share of the aggregate value of the said lands.

Dated this ____ day of _____, 19____.

Witnesses:

_____ X _____

Florence Blackketter Mattoz [*sic*]

_____ _____

EXHIBIT 4

CONSENT TO SALE OF INHERITED LANDS

WHEREAS, the undersigned, is the owner of an undivided 294/8820 interest in those certain lands described as N½NE¼ Sec. 21, T. 145 N, R. 29 W., 5th P.M., County of Cass, Minnesota which were allotted to Mary Knickerbocker deceased allottee No. 855 of the Leech Lake Reservation, and

WHEREAS, I have been advised that under authority of the Act of June 25, 1910 (36 Stat. 855) and other applicable provisions of law, the Secretary of the Interior or his duly authorized representative proposes to sell the above described land at the appraised value of $605.75, which is acceptable to me as adequate compensation for said lands;

NOW, THEREFORE, I hereby consent to the sale of said lands and request the Secretary of the Interior or his duly authorized representative to sell and convey all of my right, title and interest therein, subject to payment to me or deposit to my credit at the Consolidated Chippewa Agency, my proportionate share of the aggregate value of the said lands.

Dated this ____ day of _____, 19____.

Witnesses:

_____ X _____

Florence Blackketter Mattoz [*sic*]

_____ Address: _____

UNITED STATES DEPARTMENT OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS
MINNESOTA AGENCY
P.O. Box 97
CASS LAKE, MINNESOTA 56633

December 8, 1981

Mr. Leonard A. Zolna, Jr.
Attorney at Law
8406 Laddie Road
Spring Lake Park, MN 55432

Dear Mr. Zolna:

The 2415 Land Claims Office has forwarded the results of their research to this office concerning the status of the lands interests of your client, Florence Blacketter Mottaz.

The following is a list of interests currently held in trust by your client.

Fond du Lac 139 N½SW¼ of Section 27, Township 49, Range 18, 80 acres Joe ah ke wainze, allottee. 1/15 undivided interest.

Fond du Lac 140 N½NE¼ of Section 29, Township 49, Range 18, 80 acres Ke we tah o say quay, allottee. 1/5 undivided interest plus 1/20 undivided interest by deed from Lucy Ashland LaRose.

Nett Lake 48 S½SW¼ of Section 32, Township 65, Range 22, 80 acres O gah bay cum ig oke, allottee. 1/15 undivided interest.

Bad River 21 (Wisconsin) E½NW¼ of Section 21, Township 48, Range 3, 80 acres William Rankin, allottee. 1/10 undivided interest.

Florence Mottaz inherited all of the above interests from her mother, Esther Taylor Grasshopper.

As was explained in your conversation with Lenee Ross, 2415 Land Claims Project Director, Leech Lake 855, 856

EXHIBIT 5

and 857 in which your client held a 7/210, 1/30 and 1/5 undivided interest respectively, were submitted as Secretarial Transfer cases where not all of the heirs conveyed their interests in an allotment. A legislative solution is currently being worked out for these cases. A copy of this report including the above allotments is enclosed.

Florence Mottaz held a total 1/15 undivided interest in the allotment of James Taylor, Sr., Leech Lake 1730. She signed a consent to the sale of that land to the Minnesota Chippewa Tribe on April 18, 1942. The copies of documents pertaining to that sale are also enclosed.

Mrs. Mottaz contends she never consented to sell her 1/5 interest in Fond du Lac 286. However, a letter dated January 4, 1955 from the Area Realty Officer suggests that she did receive payment. A copy of the letter is enclosed.

We hope this information has been of help to you. Should you have any questions, please feel free to contact this office.

Sincerely,

WAYNE ENQUIST
Realty Officer

LEONARD A. ZOLNA, JR.
ATTORNEY AT LAW
8406 LADDIE ROAD
SPRING LAKE PARK, MN 55432
Telephone (612) 786-4316

October 24, 1981

Bureau of Indian Affairs
Acting Superintendent
Mr. Steven Tibbetts
P.O. Box 97
Cass Lake, MINN 56633

Re: Real Property Mgmt. 1106-01 TRR 8-7

Dear Superintendent Tibbetts:

On August 5, 1981 I wrote you a letter requesting information on various pieces of property that Mrs. Florence Blacketter Mottaz had or has an interest. I did receive a letter from you concerning the Diamond Match Company sale of FDL 286 E 1/2 NE 1/4 Sec. 8-49-18. However, to date I have not received an updated list of all land interests held by Florence Blacketter Mottaz. I am still interested in obtaining this information for my client.

My client would also like further verification concerning the sale of Fond du Lac 286. She insists that she did not sign the Consent to Sale and I must admit that the copy you sent me does not have her signature nor any of the witnesses. Were the Consent to Sale forms required as a prerequisite to the sale or could property be sold without obtaining the signatures of all heirs?

My client has asked me to obtain any and all records, letters, vouchers, consent to sale, and any other type of document that the BIA has in it's possession concerning the following properties:

FDL 286

LL 855 N 1/2 NE 1/4 Sec. 21-145-29

LL 856 NW 1/4 SW 1/4 Sec. 21-145-29 NE 1/4 NW 1/4

LL 857 SE 1/4 NW 1/4 and SW 1/4 NE 1/4 Sec. 15-141-30

I would appreciate copies of all such documents and I have enclosed an authorization for release of this information to me from Mrs. Mottaz.

Thank you in advance for your consideration of this matter.

Sincerely,

LEONARD A. ZOLNA, JR.

Supreme Court of the United States

No. 85-546

UNITED STATES, PETITIONER

v.

FLORENCE BLACKETTER MOTTAZ, ETC.

ORDER ALLOWING CERTIORARI. *Filed November 18, 1985.*

The petition herein for a writ of certiorari to the *United States Court of Appeals for the Eighth Circuit* is granted.